ORIGINAL

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

UNITED TRANSPORTATION UNION, ILLINOIS STATE LEGISLATIVE BOARD	)	
Petition for rulemaking to require safe walkways for railroad employees in the state	)	T03-0015

JOINT RESPONSE TO UNITED TRANSPORTATION UNION'S PETITION FOR A RULEMAKING COVERING WALKWAYS

Norfolk Southern Railway Company; Illinois Central Railroad Company; Grand Trunk Western Railroad Incorporated; Chicago, Central & Pacific Railroad Company; Wisconsin Central, Ltd.; and Wisconsin Chicago Link Ltd. (collectively, the "Joint Respondents"), by and through their undersigned attorneys, hereby respond to the Petition (the "Petition") by the Illinois State Legislative Board, United Transportation (the "UTU"), for a "Rulemaking Covering Safe Walkways":

1. The Joint Respondents provide rail freight service throughout Canada and the Eastern and Central United States, including the State of Illinois. The Joint Respondents and their affiliates together employ over 46,000 persons, approximately 3000 of which are employed in Illinois.

2. The Joint Respondents have several major rail facilities in the State of Illinois, including rail classification yards in Centralia, Champaign, Chicago, Decatur, Hawthorne, Markham, and Mattoon.

3. The UTU filed its Petition with the Commission on or about February 13, 2003, whereby the UTU has asked the Commission to promulgate regulations governing walkways in the State of Illinois.

4. Attached to the UTU's Petition were draft regulations, which the UTU initially asked the Commission to adopt.

5. Following several months of negotiations with some of the carriers, the UTU has reached agreement with Union Pacific Railroad Company ("UP") and Burlington Northern and Santa Fe Railway Company ("BSNF") on a version of the proposed regulations (the "UTU/UP/BNSF Version") that was filed with the Commission on or about July 11, 2003.

6. On or about July 15, 2003, CSX Transportation, Inc. ("CSX") filed with the Commission a version of the proposed regulations (the "CSX Version") that would be acceptable to CSX, without waiver of its right to assert any defenses, including federal preemption, Constitutional, or administrative powers defenses.

7. The Joint Respondents are opposed to the promulgation of regulations set forth in the UTU/UP/BNSF Version, or the CSX Version (collectively, the "Proposed Rules").

8. For the reasons set forth below, the Joint Respondents urge the Commission to dismiss the Petition, and to deny any request to adopt the Proposed Rules.

I. THE COMMISSION DOES NOT HAVE THE POWER TO ADOPT THE PROPOSED RULES.

9. The Commission's promulgation of the Proposed Rules would be preempted by federal law.

10. In addition, the Illinois General Assembly has not delegated to the Commission the authority to promulgate the Proposed Rules.

A. The Proposed Rules are Preempted by Federal Law.

11. In 1970, Congress enacted the Federal Railroad Safety Act (the "FRSA"), codified at 49 U.S.C.§ 20101, *et seq.*

12. The purpose of the FRSA is "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101.

13. The FRSA provides that "[l]aws, regulations, and orders related to railroad safety...shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106.

14. In furtherance of that goal, the FRSA provides that State laws, regulations, or orders related to railroad safety are invalid to the extent the Secretary of Transportation (the "Secretary") "prescribes a regulation or issues an order covering the subject matter of the State requirement." However, a more stringent law, regulation or order is saved from preemption if it "(1) is necessary to eliminate or reduce an essentially local safety...hazard; (2) is not incompatible with a law, regulation, or order of the United States Government; *and* (3) does not unreasonably burden interstate commerce." 49 U.S.C. § 20106 (emphasis added).

i. Application of FRSA Preemption to the Proposed Rules

15. The FRSA gives the Secretary, acting through the Federal Railroad Administration (the "FRA"), the authority to prescribe regulations and issue orders "for every area of railroad safety." 49 U.S.C. § 20103.

16. Pursuant to this delegation of authority, the Secretary has promulgated extensive regulations setting forth standards for track and worker safety. 49 CFR §§ 213-214 (2003).

17. These regulations cover the subject matter of the Proposed Rules. *See, Missouri Pac. R.R. Co. v. Railroad Comm'n of Texas,* 948 F.2d 179 (5th Cir. 1991) (upholding district court finding that state walkway requirements add to federal track safety standards, and therefore are preempted); *Norfolk and Western Ry. Co. v. Burns,* 587 F. Supp. 161 (E.D. Mich. 1984) (holding that walkways are part of the track structure and are not subject to further regulation by the states); *Black v. Seaboard Sys. R.R.,* 487 N.E.2d 468 (Ind. Ct. App. 1986).

18. Walkways generally consist of part of the ballast that supports the adjacent track, so any regulation of walkways would necessarily involve regulation of the track structure.

19. The Proposed Rules would regulate the track support structure in ways that federal law does not, which is impermissible under the FRSA. *See, Missouri Pac.,* 948 F.2d at 184 ("Even if the addition of walkways did not create drainage problems or weaken the roadbed, the state provisions would still require the railroads to enlarge and strengthen existing roadbeds to accommodate the walkways – which is enough to support a finding of preemption").

20. Furthermore, as discussed in Part II.A., *infra*, the Proposed Rules would undermine the Joint Respondents' ability to comply with federal track safety standards.

21. The Proposed Rules, which would apply statewide if adopted by the Commission, are not saved by the local safety hazard exception. *See, Id.* at 186.

ii. Erroneous Application of FRSA Preemption to Walkway Rules in other Jurisdictions

22. Although some courts have held that state walkway rules are not preempted by the FRSA, those holdings are inconsistent with the subsequent pronouncement of the Supreme Court of the United States on this subject and subsequent rules promulgated by the Secretary.

23. The seminal case favoring state walkway rules over federal preemption is *Southern Pac. Transp. Co. v. Public Utils. Comm'n,* 820 F.2d 1111 (9th Cir. 1987) (upholding, *per curiam,* the Northern District of California's conclusion that walkway regulations have not been preempted by federal law).

24. The District Court reasoned that federal regulations did not cover the subject matter of the state walkway rules because, "[s]tate and federal regulations...cannot be held to cover the same subject matter unless they address the same safety concerns....The [federal] ballast regulations...are designed to insure that tracks have adequate support. The regulations dealing with vegetation on or near roadbeds are designed to insure that employees can perform necessary maintenance work. No FRA regulation addresses the concern that employees have a safe working environment near railroad tracks." *Southern Pac. Transp. Co. v. Public Utils. Comm'n,* 647 F. Supp. 1220, 1225 (N.D. Cal. 1986).

25. According to the District Court and the Ninth Circuit in *Southern Pac.*, "coverage" within the meaning of the FRSA depends upon whether the state and federal law have the same *purpose* – in this case, providing a safe workplace for track workers.

26. But the U. S. Supreme Court has since held that the FRSA "does *not*...call for an inquiry into the Secretary's purposes, but instead directs the courts to determine

whether regulations have been adopted that in fact cover the subject matter" of the State law. *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 675 (1993) (emphasis added) (holding that train speed regulations promulgated under the FRSA preempted state law negligence claim, even where the plaintiff claimed that "the Secretary's primary purpose in enacting the speed limits was not to ensure safety at grade crossings, but rather to prevent derailments").

27. Other courts declining to hold that walkway requirements arising under state law are preempted by the FRSA have made the same error as the federal courts in California. *Grimes v. Norfolk Southern Ry. Co.,* 116 F. Supp. 2d 995, 1002-1003 (N. D. Ind. 2000) (declaring, despite *Easterwood*, that "[t]he [federal track] regulations are directed toward creating a safe roadbed for trains, not a safe walkway for railroad employees"); *Illinois Gulf Central R.R. Co. v. Tennessee Pub. Serv. Comm'n*, 736 S.W.2d 112, 116 (Tenn. Ct. App. 1987) (citing *Southern Pac.* for the proposition that "State and federal regulations...cannot be held to cover the same subject matter unless they address the same safety concerns.")

28. Furthermore, since *Southern Pac.* was decided, the Secretary has adopted regulations specifically pertaining to railroad worker safety. 49 CFR § 214 (2003).

29. Therefore, the factual premise of *Southern Pac.* that "[n]o FRA regulation addresses the concern that employees have a safe working environment near railroad tracks" is no longer true.

30. In light of the U.S. Supreme Court's decision in *Easterwood* and the Secretary's adoption of railroad worker safety rules, the legal and factual foundations of *Southern Pac.* and any similar cases have been completely eroded.

iii. Application of FRSA Preemption in the Seventh Circuit

31. Although the Seventh Circuit has not had occasion to determine whether walkway rules are preempted by the FRSA, the Seventh Circuit has applied FRSA preemption to a variety of state and local laws. *Michigan Southern R.R. Co. v. City of Kendallville,* 251 F.3d 1152 (7th Cir. 2001) (holding that the FRSA preempts local weed control ordinance); *Waymire v. Norfolk and Western Ry. Co.,* 218 F.3d 773 (7th Cir. 2000) (holding that the FRSA preempts action under the Federal Employers' Liability Act where plaintiff claimed railroad was negligent in running train at unsafe speed and in failing to install additional warning devices at grade crossing); *Burlington Northern and Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790 (7th Cir. 1999) (holding that the FRSA preempts portion of Wisconsin law mandating locomotive crew sizes).

32. Importantly, the Seventh Circuit has rejected the argument that state laws relating to railroad safety are saved from preemption under the FRSA as long as they do not contradict federal law. *Doyle,* 186 F.3d at 796 (noting that the FRSA "does not distinguish between contradictory state requirements and merely duplicative state requirements").

33. Therefore, even if the Proposed Rules do not outright contradict federal requirements (a contention which, as discussed in Part II.A. below, the Joint Respondents contest), they are nonetheless preempted because they add to existing federal track and worker safety requirements.

B. The Illinois General Assembly Has Not Delegated to the Commission the Power to Adopt the Proposed Rules.

34. "The [Illinois Commerce] Commission, because it is a creature of the legislature, derives its power and authority *solely* from the statute creating it, and its acts

or orders which are beyond the purview of the statute are void." *City of Chicago v. Illinois Commerce Comm'n*, 79 Ill.2d 213, 217-18, 402 N.E.2d 595, 597-98 (1980) (citing *People ex rel. Illinois Highway Transp. Auth. Co. v. Biggs.*, 402 Ill. 401, 84 N.E.2d 372 (1949)) (emphasis added).

35. In order for the Commission to adopt the Proposed Rules or any other valid walkway regulations, it must find a source of authority conferred upon it by the Illinois General Assembly.

i. Sources of the Commission's Rulemaking Power

36. The Commission's general rule-making authority is set forth at 625 ILCS 5/18c-1202, which gives the Commission the power to "[a]dopt appropriate regulations setting forth the standards and procedures by which it will administer and enforce [Chapter 625], with such regulations being uniform for all modes of transportation or different for the different modes as will, in the opinion of the Commission, best effectuate the purposes of [Chapter 625]."

37. While Section 5/18c-1202 gives the Commission the power to adopt regulations necessary to implement its statutory authority, the regulations promulgated under this section "cannot extend or alter the operation" of that authority. *Board of Trustees of the Univ. of Illinois v. Illinois Educ. Labor Relations Bd.*, 274 Ill. App. 3d 145, 148, 653 N.E.2d 882, 884 (1st Dist. 1995).

38. 625 ILCS 5/18c-7101 is merely a statement of the Commission's enforcement powers, and is not a grant of rulemaking authority.

39. The substantive source of the Commission's power to regulate railroad tracks, facilities, and equipment is found at 625 ILCS 5/18c-7401.

40. The UTU cited this statute in its cover letter to the Commission when it filed the Petition.

41. But Section 5/18c/-7401, which is entitled "Safety Requirements for Track, Facilities, and Equipment," does *not* give the Commission power to adopt the Proposed Rules or any other rules governing walkways.

42. Subsection 1 provides, "*General Requirements.* Each rail carrier shall, consistent with rules, orders, and regulations of the Federal Railroad Administration, construct, maintain, and operate all of its equipment, track and other property in this State in such a manner as to pose no undue risk to its employees or the person or property of any member of the public."

43. This subsection does not give the Commission any substantive rule-making power; it merely requires railroads to "construct, maintain, and operate all of its equipment, track and other property" consistent with rules orders and regulations adopted *by the FRA.*

44. Subsection 2 goes on to say, "*Adoption of Railroad Standards.* The track safety standards and accident/incident standards promulgated by the Federal Railroad Administration shall be safety standards of the Commission. The Commission may, in addition, adopt by reference in its regulations other federal railroad safety standards, whether contained in federal statutes or in regulations adopted pursuant to such statutes."

45. This subsection requires the Commission to adopt the FRA's safety standards, and gives the Commission the power to adopt other *federal* railroad safety standards. It does not grant the Commission authority to enact its *own* standards.

46. Subsections 3, 4, 6, 7, and 8 address grade crossings, radio communications, first aid kits, abandonments, and railroad-highway bridge clearances, respectively. *None* of these subsections has any application to walkways.

47. Subsection 5 addresses walkways on bridges and trestles, which, although partially addressed in the proposed regulations attached to the Petition, are beyond the scope of the UTU/UP/BNSF Proposal and the CSX Proposal.

ii. History of the Commission's Power to Regulate Rail Carriers

48. That the Commission does not have the power to adopt walkway rules is confirmed by the history of the Commission's enabling legislation.

49. Prior to 1986, the General Assembly's delegation of railroad regulatory authority to the Commission was quite broad.

50. Until that time, railroads were "public utilities" under Illinois law (*see,* Ill. Rev. Stat. Ch. 111 2/3, para. 10.3) and were subject to extensive safety regulation by the Commission: "The Commission shall have power, after a hearing or without a hearing...and upon its own motion, or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other appliances...to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand...." Ill. Rev. Stat. Ch. 111 2/3, para. 61 (1983).

51. But in 1985, the General Assembly passed the Illinois Commercial Transportation Law (a portion of Public Act 84-796, or the "Act"), which became effective on January 1, 1986.

52. The Act removed railroads and motor carriers from the definition of "public utilities" (*see,* Section 4 of the Act) and created new policies and guidelines for regulating railroads in the State of Illinois.

53. As a result, the Commission's broad power to regulate the safety of the plant, equipment or property of "public utilities" (now codified at 220 ILCS 5/8-503) no longer applies to railroads.

54. The Commission's power to regulate railroad facilities is now set forth in Chapter 18/c, and, as discussed above, does not include the power to regulate walkways.

55. Therefore, the Commission would exceed its authority by adopting the Proposed Rules.

56. Pursuant to 5 ILCS 100/10-55(c), "[i]n any case in which a party has any administrative rule invalidated by a court for any reason, including but not limited to the agency's exceeding its statutory authority or the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including attorney's fees."

II. EVEN IF IT HAD THE POWER TO DO SO, THE COMMISSION SHOULD REFUSE TO ADOPT THE PROPOSED RULES IN ANY CASE.

57. As the Petitioner, it is the UTU's burden to demonstrate that the Proposed Rules are necessary or desirable and that the benefits of the Proposed Rules outweigh the costs.

58. For the reasons set forth below, the UTU cannot meet this burden.

59. The Proposed Rules would be the first of their kind outside the Ninth Circuit, where, as discussed in Part I.A., above, the U.S. Court of Appeals expressly held in a now obsolete decision that state walkway rules are not preempted by the FRSA.[1]

60. Although there are walkway rules in states outside the Ninth Circuit, none are as comprehensive as the Proposed Rules, and many predate the enactment of the FRSA and/or the adoption of 49 § Part 213.[2]

61. The Proposed Rules would require railroads to comply with numerous standards in constructing new yard tracks in Illinois, including ballast size limitations and restrictions on ballast slope and walkway width.

62. In addition, railroads operating in Illinois may be required in certain circumstances to rebuild existing railroad facilities in order to comply with the new standards. These existing facilities could include mainline tracks.

63. The Proposed Rules will not improve employee safety at the Joint Respondents' railroad facilities in Illinois, and in fact will impair the Joint Respondents' ability to safely operate those facilities.

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[1] As also discussed in Part I.A., above, the Ninth Circuit's holding in that case is no longer sound in light of the subsequent decision of the U.S. Supreme Court in *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658 (1993), and the subsequent adoption of worker safety rules by the FRA.

[2] Unlike the Proposed Rules, Iowa's and New Jersey's walkway rules only apply to bridges and trestles. Iowa Code § 327F.3; N.J.A.C. § 12:185-29.1. Ohio's walkway rule is also limited to bridges, but even that regulation has been invalidated under the FRSA. *Norfolk and Western Ry. Co. v. Public Utils. Comm'n,* 926 F.2d 567 (6th Cir. 1991). The laws of Maryland and New York merely require that walkways "ordinarily used by train and yardmen and other employees...be kept in reasonably suitable condition." COMAR 09.12.91.04 G(3), COMAR 20.95.02.07 B; NY CLS RR § 51-a.5. Missouri's walkway regulations apply only to industry-owned tracks, not those owned by railroads. 4 CSR 265-8.110. Pennsylvania law requires that walkways be kept "in reasonably suitable condition," and that they be constructed on certain types of bridges. 52 Pa. Code § 33.125(b); 52 Pa. Code § 33.43. Tennessee's walkway regulations, unlike the Proposed Rules, "are to be construed not as a blanket order requiring all railroads in all circumstances to construct or reconstruct all walkways in accordance with [certain] standards, but rather as a statement of recommended practice." Furthermore, the existence of the Tennessee regulations "is not intended to imply that other practices may not be considered safe under the circumstances of particular situations." Tenn. Comp. R. & Regs. R. 1680-9-2-.04.

64. Furthermore, compliance with the Proposed Rules will be difficult and unduly and unnecessarily burdensome.

A. The Proposed Rules will not have a Positive Impact on Railroad Safety in Illinois.

65. In its Petition, the UTU declared that the purpose of its proposal for walkway rules is safety.

66. The UTU claims that according to statistics compiled by the FRA, Illinois ranks worst in the nation with regard to "walkway caused injuries."

67. The UTU further claims that its recent agreement with most rail carriers in Illinois governing the use of remote locomotive control devices "adds to the necessity for safe walkways."

68. The UTU's premises for advocating a walkway rule in Illinois would appear to be (1) that the railroad industry's safety record in Illinois with regard to "walkway" type injuries is worse than in other states; (2) that the onset of the use of remote control locomotive devices will lead to further injuries; and (3) that the aforementioned conditions will be ameliorated by the Proposed Rules.

69. All three of the UTU's premises are false.

i. Safety Data

70. As an initial matter, the UTU's claims with regard to the railroads' safety record in Illinois are misleading.

71. The FRA statistics cited by the UTU cover very broad categories of injuries that involve slips and falls generally, and are not necessarily related to injuries caused by the condition or lack of walkways.

72. In fact, the Joint Respondents' accident reports reveal that the slip and fall injuries in Illinois reported by them to the FRA in the last few years would not have been prevented by the Proposed Rules.

73. Furthermore, there is no evidence that the use by some railroad employees of "shoebox-sized" remote control devices will lead those few employees who use them to experience "walkway" injuries. The operation of remote control locomotive devices has not led to higher injury rates in Canada, where the devices have been in use for a number of years.

74. Finally, the Proposed Rules will do nothing to improve railroad worker safety and there is no evidence that they will.

75. The Joint Respondents' safety data reveals no correlation between "walkway" injuries and yard ballast size.

76. There is also no evidence in the data that the slope or width of "walkways" has any impact on injury rates.

ii. The Proposed Rules will make Railroad Operations in Illinois Less Safe.

77. Far from making railroad facilities in Illinois safer, the Proposed Rules will actually impair the ability of the Joint Respondents and other carriers to operate their facilities in a safe manner.

78. The Proposed Rules set forth standards for walkway surface materials adjacent to tracks within the scope of the rules.

79. As a practical matter, walkway surface material is the ballast that supports the adjacent track.

80. Ballast is regulated by the FRA, which requires railroads to support their tracks with material (1) that transmits and distributes the load of the track and rolling equipment, (2) restrains the track when subjected to forces exerted by rolling equipment and thermal stress, (3) provides adequate drainage for the track, and (4) maintains proper track alignment. 49 CFR § 213.103.[3]

81. It is crucial to the proper maintenance of the track that the ballast material drain properly; otherwise, the accumulation of water beneath the track will undermine its support.

82. The ballast size requirements set forth in the Proposed Rules are not consistent with those recommended by the American Railway Engineering and Maintenance-of-Way Association ("AREMA") with regard to ballast used on mainline track.

83. AREMA is an association of railroad civil engineers, consulting engineers, material suppliers, railway equipment manufacturers and testing engineers who recommend materials, maintenance practices, designs and methods to the railroad industry.

84. The purpose of the AREMA ballast guidelines is to recommend a mix of ballast material that will serve the purposes of adequately supporting and restraining the track while draining properly.

85. AREMA recommends the use of larger ballast on mainline tracks than in yards because the use of larger ballast creates better drainage conditions. Adequate

[3] As discussed in Part I.A., above, the FRA's adoption of this regulation would preempt the Commission's adoption of the Proposed Rules.

drainage is especially important on mainline tracks because railroad equipment operates at high speed over these tracks.

86. The Proposed Rules may in some circumstances require the use of smaller ballast on mainline tracks than is recommended by AREMA, thereby impairing proper drainage on those tracks.

87. The application of the Proposed Rules to mainline tracks would undermine the railroads' ability to properly and safely maintain those tracks.

88. Furthermore, poor track drainage may result in wet and muddy conditions that may impede the work of railroad employees and make their working conditions less safe.

89. While the ballast size requirements set forth in the Proposed Rules may be consistent with the guidelines adopted by the American Railway Engineering and Maintenance-of-Way Association ("AREMA") with regard to ballast used in yards, the AREMA guidelines were never intended to be used as rigid standards.

90. The mix of yard ballast material recommended by AREMA is not necessarily the optimal mix for every location.

91. Because soil, weather, topographical, and track conditions vary among yard locations, it may be necessary for a railroad to deviate from the AREMA recommendations.

92. If the railroads are not allowed to deviate from the AREMA guidelines, as they arguably would not be if the guidelines became legal standards, the railroads may be prevented from safely and adequately maintaining their yard tracks in Illinois.

93. The Proposed Rules also mandate a maximum slope limitation for walkways adjacent to tracks within the scope of the rules.

94. As noted above, walkways are located on the ballast supporting the adjacent track.

95. Slope of the ballast is a critical factor in ensuring proper track drainage.

96. There may be occasions where it is necessary to have a ballast slope (and, therefore, a walkway slope) in excess of that allowed by the Proposed Rules in order to maintain proper track drainage.

97. Failure to adequately maintain tracks may lead to derailments, which jeopardizes not only the safety of railroad employees, but the general public as well.

iii. The Proposed Rules will not result in Reduced Injury Rates.

98. While the Proposed Rules would make it more difficult for railroads to maintain tracks in Illinois, thereby undermining employee and public safety, the Proposed Rules would do nothing to promote the safety of the employees they are intended to benefit.

99. As set forth above, there is no safety data supporting the notion that larger ballast results in increased injury rates for employees working adjacent to tracks.

100. Likewise, there is no data supporting the notion that a walkway slope of one inch in elevation for every eight inches in length, as set forth in the Proposed Rules, is materially "safer" than a walkway with any other slope. There is nothing inherently special about the 1:8 ratio advocated by the proponents of the Proposed Rules and there is no railroad engineering basis for any such standard.

B. The Proposed Rules will be Unduly and Unnecessarily Burdensome, Difficult to Comply with, and Difficult to Administer.

101. While the Proposed Rules will not make railroading any safer in Illinois, and in fact may make it harder for railroads to safely maintain and operate their tracks, the Proposed Rules will impose great and undue burdens on those who are regulated by them and charged with administering them.

102. Forcing railroads in Illinois to spend scarce resources complying with rules that will bring little if any safety benefits to employees, and in fact may make their jobs more dangerous, would require those railroads to forego directing those same resources to areas that will provide tangible safety benefits to the railroad industry and its employees.

i. Surface Material

103. The Proposed Rules would purport to ambiguously require walkways within their scope to have a "reasonably uniform" surface.

104. "Reasonably uniform" is a vague and ambiguous standard devoid of precise meaning, and neither the Commission nor any railroad operating in Illinois can say for certain whether a walkway surfaced with ballast is "reasonably uniform."

105. Any railroad governed by the Proposed Rules would be incapable of ensuring compliance with an unclear, vague and ambiguous standard whose precise meaning is not understood.

106. The Proposed Rules purport to require 100 percent of crushed walkway surface material to pass through a 1 ½ inch square sieve, provided that as long as a railroad has made a "good faith effort" to comply, a "de minimus" variation from this standard will not be deemed a violation.

107. The proposed exception for "de minimus" variation in the face of a "good faith effort" to comply itself recognizes the ill-defined and unworkable nature of the surface material standard. However, since it is not precisely known what a "de minimus" variation is, nor is it known what a railroad must do in order to avail itself of the "good faith" exception, the exception does not remedy the unclear, vague and ambiguous standard.

108. In fact, in order to ensure that they meet the "good faith" test, the Joint Respondents might be forced to substantially rework their ballasting procedures.

109. Currently, the Joint Respondents carry ballast in rail cars to locations where the ballast will be placed on the roadbed to support the track.

110. The ballast cars carry many varieties and sizes of ballast, including ballast that will be used on mainline track.

111. As described above, the mainline ballast used by the Joint Respondents is typically larger than ballast used in yards; in fact, main line ballast consists of some material that would not pass through a 1 ½ inch sieve.

112. If the Joint Respondents were to place ballast on a track for which a walkway is required by the Proposed Rules, that ballast may come from a ballast car that once contained mainline ballast.

113. Some residue from the mainline ballast might well mix with the smaller ballast when the smaller ballast is placed in the ballast car.

114. As a result, some larger ballast material (i.e., material that is larger than that allowed by the Proposed Rules) that comes from their ballast cars might well, and should be expected to, be placed on walkways governed by the Proposed Rules.

115. It is unclear whether this amount of larger ballast would be "de minimus" within the meaning of the Proposed Rules, nor is it clear whether mixing mainline ballast with "Illinois walkway ballast" in this manner would constitute "good faith"compliance.

116. In order to ensure that main line ballast does not mix with "Illinois walkway ballast," the Joint Respondents might need to assign dedicated ballast cars, or undertake to thoroughly clean cars between each use to ensure that no larger ballast remains.

117. To adopt these procedures would be unnecessarily and unduly burdensome and expensive.[4]

ii. Cross Slopes and Widths

118. The Proposed Rules purport to ambiguously require "cross slopes" to be no greater than one inch of elevation for every eight inches of "horizontal length." The Proposed Rules do not specify how the measurement is to be made, either from the beginning point or to the end point of any required measurement.

119. The terms "cross slopes" and "horizontal length" are similarly unclear, vague, and of unknown meaning to the Joint Respondents.

120. In addition, the Proposed Rules do not allow for instances where the grade of the track itself exceeds one inch of elevation for every eight inches of "horizontal length."

121. The Proposed Rules require walkways within their scope to be a minimum of two feet in width.

[4] In addition, forcing railroads to adopt these procedures for their Illinois operations would create significant burdens on interstate commerce, thereby raising serious constitutionality questions.

122. The Proposed Rules make no allowance for instances where a two foot walkway width is impossible or impractical due to terrain, property boundaries, or proximity to other tracks, structures, or facilities.

123. Thus, there may be cases where the Proposed Rules not only arguably require the construction of walkways, but the reconstruction of entire sections of existing track to ensure compliance with the slope and width limitations.

iii. Hazards and Obstructions

124. The Proposed Rules ambiguously provide that walkways within their scope be kept "reasonably free" of "spilled fuel oil, sand, posts, rocks and other hazards and obstructions."

125. The term "reasonably free" is unclear, vague, and ambiguous and of unknown meaning to the Joint Respondents.

126. Rail yards and railroad facilities by their very nature contain hazards and obstructions, and those hazards and obstructions are sometimes present on "walkways," as that term is used in the Proposed Rules.

127. Furthermore, "walkways" almost invariably contain rocks, as the walkway surface material almost always consists entirely of crushed stone.

128. Neither the Joint Respondents nor any other railroad operating in Illinois could keep any of their operating facilities "free" of hazards or obstructions, especially rocks, and imposing such a requirement would be unduly and unnecessarily burdensome and impossible to comply with.

iv. Conflict with Track Center Requirements

129. The Proposed Rules do not recognize that Illinois law mandates minimum widths between the centers of adjacent tracks. 92 Ill. Adm. Code 1500.10 *et seq.*

130. There may be instances where the Proposed Rules conflict with the track center requirements.

131. The Proposed Rules set forth no means of resolving such a conflict.

132. Thus, the Proposed Rules may improperly place railroads in the untenable position of choosing whether to violate the Proposed Rules or the track center requirements.

v. Scope of Proposed Rules

133. The Proposed Rules generally apply to newly constructed tracks in rail yards, but they may also arguably apply to existing yard tracks or other types of tracks where employees who frequently work adjacent to that track performing switching activities "are exposed to a safety hazard due to the lack of a walkway or to the condition of walkway constructed before" the effective date of the Proposed Rules.

134. Under the UTU/UP/BNSF Version, a railroad may arguably be required to construct or rebuild a walkway anytime a "safety hazard" exists, regardless of whether employees frequently work adjacent to the track.

135. It is unclear and not known to the Joint Respondents what types of "safety hazards" would lead to the requirement to construct a new walkway or modify an existing walkway.

136. If this unclear, ill-defined, vague and ambiguous standard is applied loosely, the Joint Respondents and other railroads operating in Illinois may be forced to construct new walkways along untold miles of track.

137. The construction of new walkways adjacent to existing track would be unnecessarily and unduly costly and burdensome.

vi. Waivers

138. While the Proposed Rules allow the Commission to grant "waivers" from the walkway requirements, this process would be cumbersome, time-consuming and inefficient.

139. Applying to the Commission for such waivers would not be practical when designing a new track or rebuilding an existing railroad facility. Track maintenance and ballast situations can occur which require almost immediate attention, without the luxury of time for legal notices, hearings, and rulings.

140. Furthermore, any such waiver procedure would essentially place the Commission in the position of designing and supervising the construction of railroad facilities, a function the Commission was never intended to serve and is ill-equipped to perform.

WHEREFORE, for the reasons outlined above, the Joint Respondents respectfully request that the Commission reject the Petition and deny any request to adopt the Proposed Rules or any other rules governing walkways.

Dated: September 29, 2003

Respectfully submitted,

Norfolk Southern Railway Company

By: Stephen C. Carlson
One of its Attorneys

Respectfully submitted,

Illinois Central Railroad Company, Grand Trunk Western Railroad Incorporated, Chicago, Central & Pacific Railroad Company, Wisconsin Central Ltd, and Wisconsin Chicago Link Ltd.

By: Michael Barron /SCC
One of its Attorneys

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

UNITED TRANSPORTATION UNION, ILLINOIS STATE LEGISLATIVE BOARD	)	
Petition for rulemaking to require safe walkways for railroad employees in the state.	)	T03-0015

NOTICE OF FILING

TO: SERVICE LIST

PLEASE TAKE NOTICE that on this date I have forwarded for filing with the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, the attached Joint Response to United Transportation Union's Petition for a Rulemaking Covering Walkways in the above captioned matter.

DATED this 29th day of September, 2003

By: _____
One of the Attorneys for
Norfolk Southern Railway Company

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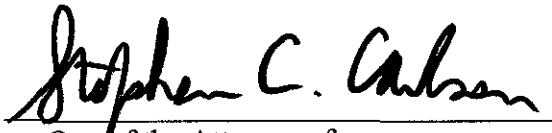
CERTIFICATE OF SERVICE

I, Stephen C. Carlson, an attorney, certify that I caused copies of the attached Notice of Filing and Joint Response to United Transportation Union's Petition for a Rulemaking Covering Walkways to be served on each of the parties listed on the service list by messenger or Federal Express this 29th day of September, 2003.

By: 

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